Supreme Court, U.S.
FILED
AUG 21 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-57

In the Supreme Court of the United States

OCTOBER TERM, 1987

UNIVERSITY OF CINCINNATI,
dba UNIVERSITY HOSPITAL, PETITIONER

v.

OTIS R. BOWEN, SECRETARY
OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

DONALD B. AYER
Acting Solicitor General
RICHARD K. WILLARD
Assistant Attorney General
ANTHONY J. STEINMEYER
JOHN P. SCHNITKER
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the Provider Reimbursement Review Board may consider a health care provider's claim that it is entitled to reimbursement under the Medicare statute for a particular cost when the provider failed to seek reimbursement for that cost from its fiscal intermediary and did not otherwise reserve before the intermediary its right to seek reimbursement for that cost.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Athens Community Hospital, Inc. v. *Schweiker*, 743 F.2d 1 (D.C. Cir. 1984)	3
Baptist Hospital East v. *Secretary of Health & Human Services*, 802 F.2d 860 (6th Cir. 1986)	8
Department of Banking v. *Pink*, 317 U.S. 264 (1942)	2

Statutes, regulations and rule:

42 U.S.C. 1395c	3
42 U.S.C. (& Supp. III) 1395f(a)	3
42 U.S.C. (& Supp. III) 1395f(b)	3
42 U.S.C. 1395g	3
42 U.S.C. (& Supp. III) 1395h	3
42 U.S.C. (& Supp. III) 1395x(u)	3
42 U.S.C. 1395x(v)(1)(A)	3
42 U.S.C. (& Supp. III) 1395*oo*(a)(1)	4
42 U.S.C. (& Supp. III) 1395*oo*(a)(1)(A)(i)	7
42 U.S.C. 1395*oo*(a)(2)	4
42 U.S.C. (& Supp. III) 1395*oo*(a)(3)	4
42 U.S.C. 1395*oo*(d)	4, 7
42 U.S.C. (& Supp. III) 1395*oo*(f)(1)	5
42 C.F.R.:	
Pt. 405:	
Section 405.1803	4
Section 405.1835	4

BEST AVAILABLE COPY

Regulations and rule—Continued: Page

Section 405.1842 5
Section 405.1803(c) 4
Sections 405.1875-405.1877 5
Section 405.1885 3

Pt. 413:

Section 413.20(a) 3
Section 413.20(b) 3
Section 413.24(f) 3
Section 413.24(f)(2) 3
Section 413.60 ..... 3, 4

Pt. 421:

Section 421.3 3
Sections 421.100-421.128 3

Sup. Ct. R. 20.4 2

Miscellaneous:

R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* (6th ed. 1986) 2

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-57

UNIVERSITY OF CINCINNATI,
dba UNIVERSITY HOSPITAL, PETITIONER

v.

OTIS R. BOWEN, SECRETARY
OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A28) is reported at 809 F.2d 307. The opinion and judgment of the district court (Pet. Supp. App. A30-A32) are unreported.[1]

JURISDICTION

The judgment of the court of appeals was entered on January 15, 1987. Petitioner subsequently filed

---

[1] The district court's opinion is reproduced in the "Supplementary Appendix" to the petition.

in the court of appeals a document styled "Plaintiff-Appellee's Petition For Rehearing *en banc*." The court of appeals entered an order on March 19, 1987, stating in pertinent part that the petition had been circulated to all active judges "and no judge * * * having requested a vote on the suggestion for rehearing *en banc*, the petition for rehearing has been referred to the original hearing panel" (Pet. App. A29). The order goes on to state that "[t]he panel has further reviewed the petition for rehearing" and that "the petition is denied" (*ibid.*). The petition for a writ of certiorari was filed on June 17, 1987.[2] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. At the time of the events at issue in this case, all "provider[s]" of health care services to Medicare beneficiaries were reimbursed by the Secretary of Health and Human Services on an annual basis for

---

[2] If the document filed by petitioner in the court of appeals had consisted solely of a suggestion for rehearing en banc, this Court would lack jurisdiction over the certiorari petition in this case. The running of the 90-day period in which a certiorari petition may be filed is tolled by a petition for panel rehearing, not by a suggestion for rehearing en banc. Sup. Ct. R. 20.4; R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 312-314 (6th ed. 1986); see also *Department of Banking* v. *Pink*, 317 U.S. 264, 266 (1942). Because the certiorari petition here was not filed within 90 days from the date of the entry of the court of appeals' judgment, the certiorari petition is timely only if the 90-day period was tolled by the filing of a panel rehearing petition in the court of appeals. The court of appeals apparently treated petitioner's filing as both a petition for panel rehearing and a suggestion for rehearing en banc, and we therefore do not contend that the certiorari petition is out of time.

the "reasonable cost" of those health care services. 42 U.S.C. (& Supp. III) 1395f(b), 1395x(u) and (v)(1)(A).[3] Over the course of the year, the Secretary made payments to a provider based upon an estimate of the amounts owed to the provider. 42 U.S.C. 1395g; 42 C.F.R. 413.60. At the end of the year, the provider submitted a claim for reimbursement in the form of a "cost report." 42 U.S.C. (& Supp. III) 1395f(a); 42 C.F.R. 413.20(a) and (b), 413.24(f).[4] The cost report is "a lengtny document consisting of numerous schedules, worksheets, and supplemental worksheets. * * * [A] cost report, when completed, is approximately three-quarters of an inch thick" (*Athens Community Hospital, Inc.* v. *Schweiker*, 743 F.2d 1, 3 (D.C. Cir. 1984)). Providers list on the worksheets cost items for which they do not seek reimbursement because those cost items supply background information that supports the provider's cost claims.

The cost report is submitted to the provider's "fiscal intermediary" for review.[5] The intermediary audits the cost report and issues a Notice of Program

---

[3] These cases concern payments under "Part A" of the Medicare statute, which provides coverage for "the costs of hospital, related post-hospital, home health services, and hospice care" (42 U.S.C. 1395c).

[4] The report is due three months after the end of the provider's fiscal year. The provider may obtain a 30-day extension of the due date for "good cause." 42 C.F.R. 413.24(f)(2).

[5] The intermediary, which is generally a private insurance company, is an entity that, pursuant to a contract with the Secretary, acts as the Secretary's agent in reviewing the provider's claims and determining the amount of reimbursement owed to the provider. See 42 U.S.C. (& Supp. III) 1395h; 42 C.F.R. 421.3, 421.100-421.128.

Reimbursement specifying the total amount of reimbursement due to the provider and explaining any adjustments to the costs claimed by the provider. See 42 C.F.R. 405.1803.[6]

If a provider has timely filed its cost report and is "dissatisfied with [the intermediary's] final determination * * * as to the amount of total program reimbursement due the provider" or has not received a final determination on a "timely basis," the provider "may obtain a hearing with respect to such cost report" before the Provider Reimbursement Review Board (PRRB or Board). 42 U.S.C. (& Supp. III) 1395*oo*(a)(1); see also 42 C.F.R. 405.1835.[7] The PRRB is authorized by statute (42 U.S.C. 1395*oo* (d)) to

> affirm, modify, or reverse a final determination of the fiscal intermediary with respect to a cost report and to make any other revisions on matters covered by such cost report (including revisions adverse to the provider of services) even though such matters were not considered by the intermediary in making such final determination.

The Board's decision is final unless the Secretary reverses, affirms, or modifies the decision within 60 days. The Board's decision—or the Secretary's modified de-

---

[6] The reimbursement award specified in the Notice of Program Reimbursement is compared to the Secretary's payments to the provider. Any deficiency is paid by the Secretary and any overpayment is repaid by the provider. 42 C.F.R. 405.1803(c), 413.60.

[7] Review by the PRRB is available only if the amount in controversy is $10,000 or more and the provider's request for a hearing is timely filed (42 U.S.C. (& Supp. III) 1395*oo*(a)(2) and (3)).

cision, if any—is subject to judicial review in federal district court pursuant to the Administrative Procedure Act. 42 U.S.C. (& Supp. III) 1395*oo*(f)(1); 42 C.F.R. 405.1875-405.1877.

The statute establishes a second, more expeditious route into court in certain circumstances. A provider may obtain direct judicial review of "any action of the fiscal intermediary which involves a question of law or regulations relevant to the matters in controversy whenever the Board determines * * * that it is without authority to decide the question." 42 U.S.C. (& Supp. III) 1395*oo*(f)(1); see also 42 C.F.R. 405.1842.[8]

2. Petitioner is certified as a provider of services under the Medicare program. Petitioner's cost reports for its fiscal years ending in 1979, 1980 and 1981 listed certain expenses for intern and resident education, and related overhead, in connection with the operation of its Family Practice Clinic and Central Psychiatric Clinic, but petitioner did not seek reimbursement for those costs in its cost reports—*i.e.*, petitioner "self-disallowed" the costs.[9] Since petitioner did not request reimbursement for the costs, petitioner's fiscal intermediary did not consider them in determining the amount of reimbursement due petitioner, and the costs were not discussed in the Notice of Program Reimbursement issued by the intermediary. Pet. App. A2-A3; Pet. Supp. App. A32.

---

[8] A final decision may be reopened by the intermediary, the Board, or the Secretary in certain circumstances. See 42 C.F.R. 405.1885.

[9] Petitioner did not make a claim for these costs because it "'mistakenly believed them to be non-reimbursable'" (Pet. App. A2 (footnote omitted)).

Petitioner appealed the intermediary's determination to the Provider Reimbursement Review Board and for the first time claimed that it was entitled to reimbursement for the education and overhead expenses. Pet. App. A3, A24. The Board found that it lacked jurisdiction over petitioner's claim because petitioner " 'failed to set forth any claim for the disputed cost in any of the filed cost reports or make any overt disclosure of a disagreement for this issue' " (*id.* at A6 (citation omitted)).

Petitioner sought judicial review of the Board's decision in the United States District Court for the Southern District of Ohio, and the district court reversed (Pet. Supp. App. A30-A32). The court held that the Board had jurisdiction over petitioner's reimbursement claim and remanded the matter for further consideration.

3. The court of appeals, in turn, reversed the judgment of the district court, and upheld the Board's determination that it lacked jurisdiction over petitioner's claim (Pet. App. A1-A28). The court emphasized at the outset that the Board's jurisdictional determination was entitled to deference, stating that its task was to "decide whether [the Board's] jurisdictional interpretation of section 1395oo is 'based on a permissible construction of the statute,' or, on the other hand, is 'inconsistent with the statutory mandate' or 'frustrate[s] the policy that Congress sought to implement' " (*id.* at A6 (citations omitted)).

The court observed that a provider may obtain Board review " 'if' it is '*dissatisfied* with a final determination of the organization serving as its fiscal intermediary . . . as to the amount of total program reimbursement due the provider.' " Pet. App. A10,

quoting 42 U.S.C. (& Supp. III) 1395*oo*(a)(1)(A)(i) (emphasis added by the court of appeals). To show dissatisfaction with the intermediary's determination, "the provider must have first made a claim in its cost report for reimbursement as to the item for which it was denied reimbursement in whole or in part." Pet. App. A10; see also *id.* at A13-A14 (this provision "requires a provider to make a claim to the fiscal intermediary for reimbursement with respect to a matter covered by the provider's cost report as a condition precedent for appealing to the Board the intermediary's final determination").

Turning to the statutory provision defining the Board's authority to alter the Notice of Program Reimbursement, the court stated that "[f]irst, 'with respect to a [provider's] cost report,' the Board is granted the 'power to affirm, modify, or reverse a final determination of the fiscal intermediary.' This grants a range of authority that is traditionally available to an appellate tribunal" (Pet. App. A13, quoting 42 U.S.C. 1395*oo*(d)). Second, the Board is authorized by statute to revise matters covered by the cost report "even though such matters were not considered by the intermediary in making such final determination" (42 U.S.C. 1395*oo*(d)). The court found that this provision "could not and does not give the Board the power or jurisdiction *de novo* to take up such claim of the provider that was not claimed for reimbursement" (Pet. App. A14). Rather, the provision allows the Board to act with respect to a reimbursement claim presented to the intermediary, "which claim the intermediary had an opportunity to attentively inspect or examine, but did not" (*id.* at A14-A15 (footnote omitted)).

Applying its analysis to the facts of the present case, the court found that the Board properly concluded that it lacked jurisdiction over petitioner's reimbursement claim. Petitioner's "self-disallowance of these costs * * * deprived the intermediary of an opportunity to 'consider' the items even though the items were 'matters covered by [petitioner's] cost report' " (Pet. App. A15).[10]

Judge Merritt and Judge Jones concurred in the result on the basis of the prior decision in *Baptist Hospital East* v. *Secretary of Health & Human Services*, 802 F.2d 860 (6th Cir. 1986). Pet. App. A27-A28.

ARGUMENT

The question presented in this case is the same as the question presented in *Bethesda Hospital Ass'n* v. *Bowen*, petition for cert. pending, No. 86-1764, *i.e.*, whether the Provider Reimbursement Review Board may consider a claim for reimbursement that was not raised before the fiscal intermediary.[11] Here, the court of appeals concluded that the Board's jurisdiction is limited to matters covered by the cost report and put into dispute by the provider before the fiscal intermediary (see Pet. App. A13-A14, A14-A15), the same rule adopted by the court of appeals in *Bethesda Hospital Ass'n*. As we discussed in our response to the certiorari petition (at 7-11), in *Bethesda Hospital Ass'n*, that conclusion regarding the scope of the

---

[10] The court stated that the question whether petitioner could have obtained reimbursement for these costs by seeking to reopen the proceedings before the fiscal intermediary was not properly before it because petitioner had not sought to reopen those proceedings (Pet. App. A22-A26).

[11] We have served petitioner's counsel with a copy of our response to the petition in *Bethesda Hospital Ass'n*.

Board's jurisdiction is supported by the language and structure of the Medicare statute, and by significant practical considerations. For the reasons stated in that response, however, we have suggested that the Court should grant the petition for a writ of certiorari in *Bethesda Hospital Ass'n.*

CONCLUSION

The petition for a writ of certiorari should be held and disposed of as appropriate in light of the disposition of *Bethesda Hospital Ass'n* v. *Bowen*, petition for cert. pending, No. 86-1764.

Respectfully submitted.

DONALD B. AYER
Acting Solicitor General *

RICHARD K. WILLARD
Assistant Attorney General

ANTHONY J. STEINMEYER
JOHN P. SCHNITKER
Attorneys

AUGUST 1987

---

* The Solicitor General is disqualified in this case.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1987 181483 40489